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No. 556

In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

-vs-

Edward C. Wolfe

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of South Dakota (R 53) is reported in 18 N. W. 2d 755. It has not yet been officially reported in the South Dakota Reports.

STATEMENT OF JURISDICTION

(a) Jurisdiction of this Court is invoked under Sub-division (b) of Section 237 of the Judicial Code (§344 of 28 U. S. Code), as amended by Act of Congress of February 13, 1925, in that a right, title, privilege and immunity was set up and claimed by Petitioner under the Constitution of the United States, and such right, title, privilege and immunity was denied to Petitioner by the decision and judgment of the Supreme Court of the State of South Dakota, which is hereby sought to have reviewed.

(b) The particular provision of the Federal Constitution under which Petitioner claims it was denied rights is Section 1 of Article 4 of the United States Constitution, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".

(c) The judgment of the Supreme Court of the State of South Dakota sought to have reviewed is dated May 15, 1945. (R 63) A petition for rehearing was timely made and entertained by the Court, which was denied on June 26, 1945. (R 64) On Sept. 11, 1945, an order was made by a Justice of this Court which extended the time for filing petition for certiorari to and including Oct. 26, 1945. (R 67) This petition for Writ of Certiorari was presented to this Court on October 23, 1945. The opinion of the South Dakota Supreme Court given upon rendering the said judgment (R 53) is reported in 18 N. W.2d 755, but has not been as yet published in the official South Dakota Reports. There was no opinion given on denying the petition for rehearing.

A statement was made in the brief in support of the Petition for Certiorari (pp. 2 to 5) showing the stage and the manner in which the Federal questions were raised in the lower courts, and passed upon by such courts, and is not repeated here for brevity. Reference is made to such statement in such brief for those matters.

STATEMENT OF THE CASE

Petitioner is a mutual fraternal benefit association organized under the laws of, and domiciled in, Ohio. (R 30 Ex 8, Intr. at R 48) It has a lodge system with ritualistic form of work, and a representative form of government. It transacts its affairs without profit and for the mutual benefit of its members and their beneficiaries. It makes provision for the payment of benefits by assessment on its members, and issues to members certificates assuring payment of such benefits. (R 45 Ex 12-A Intr. R 49)

On December 21, 1922, it accepted Ford Shane of Rapid City, South Dakota as an insured member. (R 26-A Ex 2) It issued to him an insurance certificate, on that date which provided that the certificate, the Constitution, By-Laws and Articles of Incorporation of the Order, together with the application for insurance signed by said insured member, shall constitute the contract between said Order and said insured member, and shall govern the payment of benefits, and any changes, additions or amendments to said constitution, By-Laws or Articles of Incorporation hereafter duly made, shall bind said Order and said insured member and his beneficiary or beneficiaries, and shall govern and control in all respects. (R 26-A Ex 2)

Section 3 of Article IV of the Constitution of the Petitioning Order provided that "insured members shall be indemnified in accordance with the terms hereinafter set out in this article against the results of bodily injury hereinafter mentioned, effected through external, violent and accidental

means, herein termed the accident, which shall be occasioned by the said accident alone and independent of all other causes". (R 46 Ex. 12-A, § 3 Art. 4) Exhibit 12-A was introduced at R 49. The indemnity for death was $5000.00 in cash and $1300.00 in weekly installments of $25.00. (R 46, Ex. 12-A, § 3 Art .4) Section 7 of this Article IV, under the subject of exemptions, provides: "Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss". (R 47, Ex. 12-A)

Section 11 of Article IV of the Constitution of said Order provided:

> "Section 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for such benefits is disallowed by the Supreme Executive Committee.
>
> "No Grand or Subordinate Council, officer, member or agent of any Subordinate Council, Grand or the Supreme Council of the Order, is authorized or permitted to waive any provisions of the Constitution of this Order, relating to insurance, as the same are now in force, or may be hereafter enacted." (R 47, Ex. 12-A)

On May 8, 1931, the insured, Ford Shane, died. The beneficiary submitted proofs to the Order claiming that the death of Ford Shane was the result of bodily injury effected through external, violent and accidental means, and asked for the death benefits. The claim was rejected by the Supreme

Executive Committee of the Order on June 8, 1931, (R 29 Ex 7, Intr. at 48) and prompt notice sent to the beneficiary. The beneficiary, Elizabeth Shane, brought an action on the certificate which was carried to the U. S. Circuit Court of Appeals, Order of U. C. T. v. Shane, 64 Fed.2d 55 (CCA 8), and later dismissed.

The beneficiary assigned her claim to Edward C. Wolfe, a citizen and resident of Ohio. (R 27 Ex. 5, Intr. at 48) In June, 1934, he brought an action on the certificate and his assigment thereof, in the Circuit Court of Pennington County, South Dakota. (R 1 and 2) Judgment was given for Wolfe in the Circuit Court; (R 24) from which the Order appealed to the Supreme Court; (R 52) which court on May 15, 1945, gave judgment affirming the judgment of the Circuit Court. (R 63)

In its answer in the suit by Wolfe in the Circuit Court, Petitioner set forth the provisions of Section 11 of Article IV of its constitution relating to the time when suits must be brought, and pleaded that the suit by Wolfe had been brought too late; (R 8 and 9) Claimed that full faith and credit should be given to the provisions of the Constitution of the Order as a part of the public acts, records and judicial proceedings of the State of Ohio, and claimed the benefit of Section 1 Article IV of the United States Constitution, and asked to be protected thereunder. (R 9) At the trial in the Circuit Court, the Order requested the Court to find and decide that the insurance certificate was an Ohio contract, and that the law of Ohio governed in its construction; (R 16) and that under Ohio law, the

provision of its constitution that no suit should be brought after six months was a valid agreement binding on the insured and its beneficiary; (R 12, 13 § XII) Petitioner also asked the Court to find that under Ohio law the death of Ford Shane was not the result of bodily injury effected through external, violent and accidental means. (R 12 § X) The Circuit Court refused to so hold. (R 17 and 18 to 23) Upon its appeal to the Supreme Court, Petitioner assigned as error the refusal of the Circuit Court to hold that suit was barred by the six months limitation in the contract, and as error the refusal of the Circuit Court to hold that the insurance certificate was an Ohio contract, and that the Ohio law governed, and that under Ohio law the death of Ford Shane was not the result of bodily injury effected through external, violent and accidental means, and that such refusal to so hold in these matters, violated the rights of Petitioner under Section 1 of Article IV of the Constitution of the United States. (R 51 § (8) and (9) These issues were presented to the Supreme Court upon the appeal, and considered by the Court and decided by that court adversely to the contentions of the Order. (See opinion of the Court R 53)

That the Court considered and passed upon these issues seems to justify the review by this court. Home Ins. Co. v. Dick, 281 U. S. 397,407.

The circumstances of the death of Ford Shane are substantially as follows:

On May 8, 1931, he went to the offices of Doctors Doyle and Janis at Rapid City, South Dakota for the purpose of having an examination made to

ascertain if he had a stricture or obstruction of the posterior urethra. (R 32 Ex. 9) Exhibit 9 was introduced at R 48. A stricture is caused by scar tissue being laid down in the canal from previous infection. The examination is made by introducing an instrument called a sound into the canal and probing until the obstruction is located. (R 41, Ex. 9) It is routine to make the examination with local anesthetic (R 39 Ex 9) It can be done without the use of an anesthetic, but it is extremely painful and severe on the patient. (R 40 Ex. 9)

At the time, Dr. Janis placed Shane on the table, told him he was going to deaden his urethra, and for that purpose injected four cc's of butyn therein. (R 33 Ex. 9) The patient immediately went into convulsions, became synotic, and in about two minutes died. (R 33 Ex. 9) Butyn is a cocaine derivative, and is commonly used for local anesthesia. (R 33) The quantity used was in approved amount. (R 35, 38 Ex. 9) Drs. Janis and Doyle were licensed and experienced physicians. No mishap, slip or accident is shown to have occurred in making the injection. The usual result of such use of butyn is to anesthetize the parts treated, and thus render the examination painless and without injury to the patient. (R 35 Ex. 9) But this patient had a bodily condition, sometimes called an idiosyncracy, which caused it to react to the drug in an unusual and unexpected way. (R 34, 37 Ex. 9) Such a reaction as here occurred is known to occur rarely, but is so rare that the medical profession does not take it into account in administering the drug. No test can be made in advance to determine whether the idiosyncracy exists. (R 38 Ex. 9) Dr. Janis, the at-

tending physician, testified that the immediate cause of Mr. Shane's death was the idiosyncracy. (R 35 Ex. 9) Dr. Doyle, also attending physician, testified that "the idiosyncracy was the cause of the succession of events that occurred". (R 40 Ex. 9) The trial court found in its decision that the death "resulted on account of the idiosyncracy" and that the sole and proximate cause of the said death was such administration of said butyn to the body of deceased when deceased had such unknown idiosyncracy. (R 22 § XV)

QUESTIONS PRESENTED

The questions presented by the record and of which a review is sought are stated in the petition for certiorari as follows:

1. Does the Full Faith and Credit Clause of the United States Constitution, Section 1 of Article 4, require, under the circumstances of this case, that the provisions of the constitution of the petitioning Order, and Ohio Fraternal Benefit Association, which allows no suit to recover benefits on an insurance certificate issued to a member to be brought later than six months from the rejection of the claim, shall be recognized and enforced by the Court in South Dakota in face of a limitation statute in South Dakota which allows the suit to be brought within six years, and in face of another South Dakota statute which declares to be void any stipulation in a contract which limits the time provided by statute within which an action may be brought thereon? The State Court decided that the federal constitution did not. Petitioner claims

that such decision was erroneous, and review of that decision is sought.

2. Was the South Dakota Court required by the Full Faith and Credit Clause of the Federal Constitution to construe the contract of insurance, and particularly that portion of the contract which provides indemnity shall be allowed only when the injury or death is the result of bodily injury effected through external, violent and accidental means, according to the law of Ohio as ascertained from the decisions of the Supreme Court of that State? Petitioner contended before the State Court that said provision of the Federal Constitution did so require, to which the State seems to have acceded. But, following this inquiry, and assuming that it should be answered in the affirmative; did the South Dakota Supreme Court err in assuming that the Ohio Court would decide that the death of Ford Shane was the result of bodily injury effected through external, violent and accidental means? Petitioner is contending that the South Dakota Court did so err, and asks a review of its decision.

ARGUMENT

The points and contentions we are making are set out in headlines, followed by a discussion for each one. The several headlines form a summary of the points in the argument.

I.

ENTRY INTO MEMBERSHIP OF AN INCORPORATED BENEFICIARY ASSOCIATION IS MORE THAN A CONTRACT; IT IS ENTERING INTO A COMPLEX AND ABIDING RELATION, AND THE RIGHTS OF MEMBERSHIP ARE GOVERNED BY THE LAW OF THE STATE OF INCORPORATION. ANOTHER STATE CANNOT ATTACH TO THE MEMBERSHIP RIGHTS AGAINST THE SOCIETY WHICH ARE REFUSED BY THE LAW OF THE DOMICILE, EVEN THOUGH SUCH MEMBER MAY BE A RESIDENT OF SUCH OTHER STATE.

Supreme Council Royal Arcanum v. Green, 237 U. S. 531

Modern Woodmen of America v. Mixer, 267 U. S. 544

Sov. Camp W. O. W. v. Bolin, 305 U. S. 66

See, also Broderick v. Rosner, 294 U. S. 629

The above doctrine is firmly established by the above decisions and has been consistently adhered to. The South Dakota Court recognized it as existing, and attempted to apply it in part to the circumstances of this case. See opinion, 18 N. W.2d at (7) page 758. (R 58)

Section 9469 of the General Code of Ohio, relating to fraternal benefit societies was a part of the Ohio statute law at all times after Ford Shane took out his insurance certificate, and reads as follows:

"Section 9469. Certificate shall Constitute Agreement. Every Certificate by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or if a voluntary association, the articles of association, the constitution and laws of the Society and the application for membership and medical examination signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the Society and the member, and copies of the same certified by the Secretary of the Society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, constitution or laws duly made or created subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership."

The last paragraph of §9473 General Code of Ohio, relating to such Societies, provides:

"Powers of Society. Every such society shall have the power to make a constitution and by-laws for the government of the Society, the admission of its members, the management of its affairs and the fixing and the readjusting

of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws, and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the Society."

South Dakota Code of 1939, § 36.0702, provides that every court of the state shall take judicial notice of the common law and statutes of every state of the United States.

There is no controversy about the Petitioner being a fraternal Benefit Society, or that it had the powers prescribed by the above Ohio Statutes.

II.

THE SIX MONTHS LIMITATION IN THE CONTRACT OF INSURANCE CONDITIONS THE RIGHT OF RECOVERY AGAINST, AND LIMITS THE LIABILITY OF, THE FRATERNAL BENEFITS SOCIETY, AND PERTAINS TO SUBSTANTIVE RIGHTS RATHER THAN THE REMEDY.

Home Ins. Company v. Dick, 281 U. S. 397
Dolan v. Royal Neighbors, 112 Mo. App. 147, 100 S. W. 498
Union Central Life Ins. Co. v. Barnes, 175 Ky. 364, 194 S. W. 339

It was the holding of the State Court that the question of when a suit might be brought on the certificate of insurance was a question solely of remedy which the Court of the forum was at liberty to apply under its own statutes and rules. On the authority of the cases cited on this point in the Summary, Petitioner asserts that the six months

limitation of time to sue is not a mere matter of remedy but conditions the right of recovery against and limits the liability of the Society and pertains to substantive rights. We understand that this is the view taken by this Court relating to a similar contract limitation in Home Ins. Co. v. Dick, 281 U. S. 397. In this case, the Court said relating to the contract limitation: "However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined". To the same effect are the other cases cited under this Point.

The South Dakota Court seems to attach some significance that the petitioning order had been admitted to transact business in South Dakota as a foreign society. (R55) Wolfe v. Order of U. C. T. of America, 18 N. W. 2d 755, 757 [3]. While there was nothing in the record to show whether or not the petitioning order had been admitted to transact business in S. D., yet the statute so required, and it would be presumed that the requirements of the statute had been complied with.

In 1919 the legislature of S. D. passed as Chapter 232, Laws of 1919, an act which was entitled "An act providing for the regulation and control of all fraternal benefit societies". Section 16 of this act provided for the admission of a foreign society. It has now been incorporated into the S. D. Code of 1939 as Sec. 31.2124 and reads as follows:

> "No foreign society shall transact any business herein without a license from the Commissioner. Any such society shall be entitled to a

license to transact business within this state upon filing with the Commissioner a duly certified copy of its charter or articles of association; a copy of its constitution and laws, certified by its secretary or corresponding officers; a power of attorney to the Commissioner as hereinafter provided; a statement of its business under oath of its president and secretary, or corresponding officers, in the form required by the Commissioner, duly verified by an examination made by the supervising insurance official of its home state or other state satisfactory to the Commissioner; a certificate from the proper official in its home state, province, or country, that the society is legally organized; a copy of its contract, which must show that benefits are provided for by periodical or other payments by persons holding similar contracts; and upon furnishing the Commissioner such other information as he may deem necessary to a proper exhibit of its business and plan of working, and upon showing that its assets are invested in accordance with the laws of the state, territory, district, province, or country where it is organized, he shall issue a license to such society to do business in this state until the first day of the succeeding March, and such license shall, upon compliance with the provisions of this chapter, be renewed annually, but in all cases to terminate on the first day of the succeeding March; provided however, that such license shall continue in full force and effect until the new license be issued or specifically refused. Any foreign

society desiring admission to this state, shall have the qualifications required of domestic societies organized under this chapter, upon a valuation by any one of the standards authorized in Section 31.2133, and have its assets invested as required by the laws of the state, territory, district, country, or province where it is organized."

Said Chapter 232 of the Laws of 1919 also contains a Section numbered 4, which now appears as Section 31.2104 of the S. D. Code of 1939, and reads as follows:

31.2104 Exemption. Except as otherwise specifically provided, such societies shall be governed by this chapter, and shall be exempt from all provisions of the other insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein.

Thus there is legislative consent and sanction that a foreign fraternal benefit society may transact its business and issue its contract which the law of its domicile authorized it to issue. No South Dakota statute at any time has been passed which modifies the above statutes.

III.

THE SIX MONTHS LIMITATION IS VALID UNDER THE LAWS OF OHIO, AND IS AN OHIO CONTRACT.

No contention is made that the six months limitations in the insurance contract is not valid

under the laws of Ohio. The South Dakota Court so found in its opinion that it was valid in Ohio, citing Bartley v. National Business Men's Association, 109 O. St. 585, 143 N. E. 386. (R 54). See Young v. Order of U. C. T., 142 Neb. 566, 7 N. W. 2d, 81, 83.

The insurance contract was an Ohio contract because the last act necessary to put the contract in force took place in Ohio. The application for the insurance was signed by the insured and forwarded to the Petitioner at Columbus, Ohio. The insurance certificate, which is dated December 21, 1922 was executed by the officers of the petitioner at Columbus, Ohio, and was forwarded to the insured in South Dakota. (R 29) This certificate recites that the insured "is hereby accepted as an insured member of said order under class A, beginning at twelve (12) o'clock noon, standard time, on the day this certificate is dated, and is entitled to all rights and benefits which may be provided for such insured member in and by the Constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date". (R 26A) There was nothing further to be done to put the certificate into force. This made it an Ohio contract. Wastun v. Lincoln Nat'l Life Ins. Co., 12 F.2d 422; Young v. Order of U. C. T., 142 Neb. 566, 7 N. W. 2d 81; 45 C. J. 56 note 22; 44 C. J. S. p 509b.

IV.

THE CLAIMED CONFLICTING STATUTE IN SOUTH DAKOTA, (S. D. Code of 1919, Section 897, now Section 10.0705 S. D. Code of 1939) IS NOT MERELY A STATUTE OF LIMITATIONS TO FIX THE TIME WITHIN WHICH THE AID OF SOUTH DAKOTA COURTS MAY BE INVOKED: IT DECLARES VOID CONTRACTS WHICH FIX THE TIME IN WHICH SUIT MAY BE BROUGHT, AND DEALS WITH THE POWERS AND CAPACITIES OF PERSONS.

Home Ins. Co. v. Dick, 281 U. S. 397.

Said South Dakota statute reads as follows:

> "Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

The applicable South Dakota statute prescribing the time within which an action might be brought on a contract was §33.0232 S. Dak. Code of 1939, previously §879 S. Dak. Code of 1919, which reads as follows:

> "civil actions . . . can be commenced only within the following specified periods of time after the cause of action shall have accrued: (4) within six years: an action upon a contract, obligation, or liability, express or implied . . .".

Thus, if the South Dakota statute of limitation is to govern, the action was brought in time; but if the contract limitation is required to be enforced, the action was brought too late.

We point out under this number that the claimed conflicting statute (§10.0705 of the South Da-

kota Code of 1939) is not merely a statute of limitations, but that it declares void contracts which fix the time in which suit may be brought, and thus deals with the powers and capacities of persons to contract. The recognition and enforcement of the six months contract limitation is not the enforcement of a foreign statute of limitations, but a matter of sustaining the contract of the parties made. Dolan v. Royal Neighbors, 112 Mo. App. 147, 100 S. W. 498.

In M. W. A. v. Mixer, 267 U. S. 544, the rights at issue under the insurance certificate concerned a question of evidence, ordinarily ruled by the law of the forum. Under the Association contract contained in a by-law, "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate . . . until the full term of the member's expectancy of life has expired". In Nebraska where the suit was brought disappearance for ten years was sufficient to prove death. This by-law conditioned the right of recovery, and this Court held that it must be upheld in spite of the rule in Nebraska; otherwise the Plaintiff would be allowed to recover upon a state of facts denied in other jurisdictions. The situation in this case is parallel.

V.

BECAUSE OF THE RELATION CREATED BY MEMBERSHIP IN A FRATERNAL BENEFIT SOCIETY, AND THE NECESSITY THAT RIGHTS BE GOVERNED BY A SINGLE LAW, THE FULL FAITH AND CREDIT CLAUSE REQUIRED THAT SOUTH DAKOTA ENFORCE THE OHIO LAW AND CONTRACT.

It cannot be said that South Dakota has any uniform policy as to the time within which suits must be brought on insurance contracts. It is true that Sec. 31.1610 S. D. Code of 1939 prohibits a life insurance policy from containing a provision "limiting the time within which any action at law or in equity may be commenced to less than six years after the cause of action shall accrue". But the South Dakota statute, regulating the contents of health and accident policies, Chapter 31.17 of the 1939 Code, first enacted in 1919, provides that such a policy shall contain a standard provision limiting the time within which suit may be brought upon the policy, as follows: "No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy". See Sec. 31.1702 (14). The statute further provides, Sec. 31.1708 (3), that it does not apply to transactions of fraternal benefit societies. But the South Dakota fraternal benefit society statute (Chap. 31.21, S. D. Code of 1939) has no special provision regarding when actions on its certificates may be brought. The effect of the South Dakota statutes seems to be that contracts of fraternal benefit societies are subject to the general statutes of limitations, Sec. 33.0232, S. D. Code of 1939; and that a South Dakota fraternal benefit society would be prohibited from contracting for a less period under Sec. 10.0705 S. D. Code of 1939. No reason is

apparent why the period for bringing suit against a fraternal benefit society on an accident policy is six years, while the period is two years when the policy is issued by other class of company. Since it is the established rule that a contract of a fraternal benefit society must be governed by the single law of the domicile of such society, we cannot see how the local or municipal law in South Dakota will be disturbed, or disorganized by requiring South Dakota to recognize and enforce the Ohio law. A South Dakota citizen would have the same right as the citizen of another state. Likewise, the law of South Dakota would become a part of the contract of a South Dakota benefit society, and its provisions as to when suit might be brought would be required to be recognized in other states. See M. W. A. v. Myers, 99 O. St. 87,124 NE. 48.

It is recognized that there are limitations on the extent to which a state may be required to enforce the conflicting statutes and records of a foreign state under the full faith and credit clause of the Federal Constitution, Alaska Packers Ass'n. v. Industrial Accident Commission, 294 U. S. 532. And it is for the Supreme Court of the United States to say for itself how far the full faith and credit clause compels the qualifications or denial of rights asserted under the laws of one state, that of the forum, by the statute of another state. Pacific Employers Insurance Company v. Industrial Accident Commission 306 U. S. 493, 502. And that, ordinarily, the state of the forum will not be required to enforce a foreign statute which is obnoxious to the public policy of the forum, Id, 306 U. S. 504.

In Klaxon Co. v. Stentor Mfg. 313 U. S. 487, this Court held that although Delaware might be compelled to enforce a New York contract, yet the incidental question of damages was a matter of local concern, on which the Delaware Court had the right to pass.

Griffin v. McCouch, 313 U. S. 498, was a diversity of citizenship case arising in Texas. Under Erie R. Co. v. Tompkins, 304 U. S. 64, the Federal Court must follow Texas law. It involved a New York contract of insurance upon the life of a Texas citizen assigned to persons alleged to have no insurable interest. Texas had a law which required the beneficiary to have an insurable interest; New York had no such requirement. This Court held that Texas had such an interest in protecting its citizens from the assumed dangers of insurance on their lives held by strangers, that it must be determined by Texas law whether the contract should be enforced.

In Pink v. A.A.A. Highway Express, 314 U. S. 201 the rights of membership in a New York corporation were involved. This Court held that the Court of Georgia had the right to determine whether a Georgia citizen had in fact become a member of this corporation, or what obligation he had assumed toward such corporation. The Court said: "Where a resident of one state has by stipulation or stock ownership become a member of a corporation or association of another, the state of his residence may have no such domestic interest in preventing him from fulfilling the obligations of membership as would admit of a restricted appli-

cation of the full faith and credit clause. But it does have a legitimate interest in determining whether its residents have assented to membership obligations sought to be imposed on them by extrastate law to which they are not otherwise subject".

The cases which have been above referred to establish the doctrine that when there is a conflict between the law of the state of the forum and the law of another state, and it is sought to have such law of the latter enforced in the state of the forum, this Court will weigh the conflicting governmental interest of the states of the two jurisdictions, and determine for itself whether the law of the forum shall prevail, or the law of the other state shall be enforced.

VI.

THE GOVERNMENTAL INTERESTS OF OHIO IN THIS CASE FAR OUTWEIGH THE INTERESTS OF SOUTH DAKOTA.

In this case a citizen of the state of South Dakota voluntarily became a member of the petitioning order, a fraternal benefit society. He thereby entered into a relationship to which it is necessary that a single law apply, according to the holdings of this Court. The law that must apply is the law of the domicile of the society. That is the important consideration in determining what law should apply. In addition, this suit was brought by an Ohio citizen, who left his own jurisdiction where it was clear that he could not recover, and came to South Dakota for his forum to avoid the effect of the Ohio law. This was an Ohio contract made and consummated in Ohio. Generally rights

acquired by contract outside a state are enforced within a state against its citizens. Performance of the contract on the part of the petitioning Order was to be made by the payment of money only, which gave rise only to a transitory cause of action. See Hartford Accident Indemnity Co., et al, v. Delta Pine Land Co. 292 U. S. 143. This case is also authority for the proposition that mere citizenship in the state of the forum does not justify such state to enlarge the obligations of a contract lawfully made in another state to accord with all its own statutory policies. The fact that the insured became an insured member of the petitioning order and entered into the contract for insurance sued on, is all admitted. There were no local matters for the South Dakota Court to inquire into, as was involved in the case of Pink v. A.A.A. Highway Exp., supra. The only question was what rights and obligations were acquired or incurred by this Ohio contract.

This is not merely a matter of requiring South Dakota to recognize a contract made by one of its citizens in Ohio with an Ohio corporation. It involves more than a contract. It involves those rights which grow out of the complex and abiding relation which membership in a fraternal beneficiary society creates, and the necessity that those rights be administered under a single law. M. W. of America v. Mixer, supra.

An appraisal of the respective interests of South Dakota and Ohio clearly shows, as we believe, that the interests of Ohio far outweigh and overbalance the governmental interests of South

Dakota. The result is that the full faith and credit clause of the c nstitution should be applied, and the South Dakota court required to recognize and enforce the Ohio law as to the period within which a suit might be brought on the certificate of insurance of the petitioning Order.

VII.

IN OHIO THE ESTABLISHED RULE IS THAT WHERE ONE OF HIS OWN VOLITION FOLLOWS AN INTENDED COURSE OF CONDUCT CULMINATING IN INJURY OR DEATH, THE RESULT MAY BE ACCIDENTAL, BUT NOT THE MEANS; AN EFFECT WHICH ENSUES AS A CONSEQUENCE OF A PURPOSED ACT IS NOT PRODUCED BY ACCIDENTAL MEANS.

There are four cases in Ohio dealing with the subject of accidental means. In chronological order they are—

New Amsterdam Casualty Co. v. Johnson, 91 O.S. 155, 110 N. E. 475 (1914)

Burns v. Employers Liability Assurance Corp. 134 O. S. 222, 16 N. E.2d 316 (1938)

Mitchell v. New York Life Ins. Co., 136 O. S. 551, 553, 27 N. E.2d, 243 (1940)

Hassey v. Metropolitan Life Ins. Co., 140 O. S. 266, 43 N. E.2d, 229. (1942)

The above headline is quoted directly from the Hassey case, supra, which is the latest of the Ohio decisions.

The Ohio decisions, cited above, clearly establish a rule of construction on the language of this insurance certificate, which is that indemnity is granted only when there is bodily injury which is "effected through external, violent and accidental

means". In the latest of these cases, Hassey v. Metropolitan Life Ins. Co., 140 Ohio State, supra the rule is definitely stated in the terms of the above headlines. That Court approved an instruction of the trial court that the accident must be in the act that precedes the injury and not merely the unexpected result.

In the earlier Ohio case of Mitchell v. New York Life Ins. Co., 136 Ohio State 551, supra, the opinion quotes with approval from the opinion in Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491, as follows:

> "But it is not enough to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure 'was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident,' (citing cases)—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental."

VIII.

THE SOUTH DAKOTA SUPREME COURT IN THIS CASE ARBITRARILY AND WITHOUT REASONABLE BASIS ASSUMED THAT THE OHIO COURT WOULD HOLD THAT THE DEATH OF FORD SHANE WAS PRODUCED BY EXTERNAL ACCIDENTAL MEANS, AND ERRONEOUSLY GAVE JUDGMENT AGAINST PETITIONER ON THIS ASSUMPTION. (R 61)

See opinion this case, 18 N. W.2d 759 (8)
See cases cited under No. VII above.

The four Ohio cases, which we cited under paragraph VII above, and which we contended established the rule in Ohio as to what constituted injury by accidental means, were reviewed by the South Dakota court in its opinion (R 59, 60). We analyze the holdings of these cases further:

In the Johnson case, supra, the insured suffered acute dilation of the heart from taking a cold plunge following a horseback ride. The respective contentions made by the parties before the Court was:

> "First. On the part of the insured: That if the event preceding the injury, and which proximately caused the injury, produced injurious results not common or usual or to be reasonably anticipated as a result thereof, the unlooked-for result makes the initial event an accident and the injury one sustained by accidental means—in short, the result determines the cause".
>
> "Second. On the part of the company. That the event preceding the injury must be in the nature of an accident; that an unexpected or

> unusual result of an act not an accident in itself does not render it (the act) an accident or the consequent injury one happening from accidental means. In other words, the cause determines the result".

The court sustained the contention of the company.

We have already quoted from the Mitchell case, supra. The view that the Ohio court is committed to the rule that the accident must be in the act that precedes the injury, is emphasized by the dissenting opinion of Judge Hart in this case who argued in his opinion (Page 59) that it was sufficient if there was an unexpected and unusual result.

We have already quoted from the opinion in the Hassey case. Again Judge Hart dissented, saying (Page 278) "I am unable to agree with the majority opinion of this court wherein it says:

> 'Where one of his own volition follows an intended course of conduct, culminating in injury or death, the result may be accidental but not the means' ".

The opinion of the Court in the case at bar (R 59) after reviewing the above four decisions of the Ohio Supreme Court on this question, concluded that the rule as stated in U. S. Mutual Accident Ass'n. v. Barry, 131 U. S. 100 would be followed by the Ohio Court. Just why the court picked out the Barry case rather than that of Phoenix Mut. Life Ins. Co. v. Landress 291 U. S. 491 we cannot understand. The opinion earlier had quoted from

the latter case, (R 59), to which the Ohio cases refer.

The South Dakota opinion goes on to say that there is no case in Ohio involving death by a drug administered to cause anaesthesia, (R 60); and because in a number of anaesthesia death cases in other jurisdictions where the administration of the drug unexpectedly caused death, such death was held to be produced by accidental means; and, because these decisions are based on the rule established in the Barry case, and since Ohio Appellate courts follow that rule, it would be assumed that the Ohio court would follow these cases. The cases from other jurisdictions so holding were cited by the court to be: Mutual Life Ins. Co. v. Dodge, 11 F.2d 486, 59 A.L.R. 1290; Taylor v. New York Life Ins. Co., 176 Minn. 171, 222 N. W. 912; Wheeler v. Title Guaranty of America, 265 Mich. 296, 251 N. W. 408; Whatcott v. Continental Casualty Co., 85 Utah 406, 39 P. 2d 733; Denton v. Travelers Ins. Co., 25 F Supp. 556; Vollrath v. Central Life Ins. Co. of Illinois, 243 Ill. Appl. 181; Schleicher V. General Accident, Fire & Life Assur. Corp., 240 Ill. App. 247.

In the Dodge case the opinion does refer to the Barry case, but it is clear that the court found the unexpected result to constitute the accidental means.

In the Denton case, the Dodge case is cited as authority for the decision but the Barry case is not mentioned therein. The contract was a New York contract, and the court followed New York decisions.

In the Taylor case, supra, the Barry case is cited in a group of cases as authority for the rule that "an effect which does not ordinarily follow, and can not be reasonably anticipated from the use of these means . . . is produced by accidental means".

In the Wheeler case, supra, the Taylor and Dodge cases are followed and cited, but the Barry case is not mentioned.

In the Whatcott case, the Barry case is not cited. The hazard insured against was from "an accidental event", not from injury by external accidental means.

In the Schleicher case, supra, the same definition of accidental means is adopted as in the Taylor case, and the Barry case is not used as a precedent.

The Vollrath case cites the Barry case, and what we consider the pertinent part of this definition is quoted, but there is no application of the definition so quoted to the facts therein presented; and the statement that "the view of the courts of this State follow the rule laid down in U. S. Mutual v. Barry" is entirely unsupported by any cases or comments.

We submit that not only does an analysis of these cases fail to show that they are all based on the rule established in the Barry case, but that in those cases citing the Barry case the court has misconstrued the rule laid down by the Supreme Court of the United States, as interpreted in the Landress case in 291 U. S. 491.

In the Barry case, it is to be noted that the controlling factor in the court's mind was that in jump-

ing from the platform something unexpected or unintended happened in the way that Dr. Barry jumped. As set forth in the opinion, the question was, whether there was anything accidental, unforeseen, involuntary or unexpected in the act of jumping, from the time the deceased left the platform until he alighted on the ground. The rule laid down in the Barry case is that "if in the act which precedes the injury, something unforeseen or unexpected occurs which produces the injury, then the injury "results through accidental means". This interpretation of the Barry case and its salient decision is forceably set forth in the Shane case, supra, which quotes with approval Judge Denison's opinion in Pope v. Prudential Ins. Co., 29 F 2d, 185, wherein he says: "The evidence recited, what the court has said in its charge to the jury, and the comments of the Supreme Court, all indicate that the approved theory of recovery was that there had been some slip or mishap attending Barry's act in jumping to the ground, whereby his intended act was, as to the manner of its execution, transformed into an unintended one."

Cases from other jurisdictions on anaesthesia deaths holding that there is an absence of accidental means are Otey v. John Hancock Mutual Life, 199 S. E. 596 (W. Va.); Hesse v. Travelers Ins. Co., 229 Pa. 125, 149 Atl. 96; United Commercial Travelers of America v. Shane, 64 F., 2d, 55. Barnstead v. Com. Trav. Mut. Acc. Ass'n. 198 N. Y. Supp. 416; Westmoreland v. Preferred Acc. Ins. Co., 75 Fed. 244.

In the Otey case, supra, the Barry case is cited

and the lower court's instruction to the jury is quoted to show that many courts have misconstrued the Barry case and used it as authority for the courts conclusion that you look to the result rather than to the means. Thus, the Supreme Court of West Virginia says that "the question was whether anything accidental, unforeseen, involuntary or unexpected occurred in the act of jumping, from the time he left the platform until he alighted on the ground . . ." The West Virginia Court likewise comments on the Vollrath, Taylor, Wheeler and Dodge cases; and as to the Dodge case says, on page 598 of the opinion, "this holding is made principally upon authority of the Barry case, supra," and on page 599 the courts says in commenting upon the Landress case, "the Landress case is chiefly important because it seems to disagree with the theory upon which the holding in the Dodge case is based." In the U. C. T. v. Shane 64 Fed. 2d, 59 the United States Circuit Court of Appeals of the 8th Circuit passed upon the record that is here involved, and held that the death of Shane was not the result of accidental means.

Do the Ohio cases, supra, rely upon the Barry case, and, if so, has the Supreme Court of Ohio adopted the interpretation of the Barry case as set forth in those cases exemplified by the Dodge cases?

The Johnson case, which is the leading case and was a case of first impression in Ohio, does not cited or rely upon the Barry case.

In the Burns case, in defining the term "accident" the Barry case is cited. It is to be noted that the court is defining the term "accident" and not the term "accidental means."

In the Mitchell case the majority opinion does not cite the Barry case. The dissenting opinion cites the Barry case as one of the authorities for the conclusion therein reached by the minority of the court.

The same situation is found in the Hassey case, in that the same Judge who wrote the dissenting opinion in the Mitchell case again uses the Barry case in his dissenting opinion therein.

The conclusion is inevitable (1) that the Supreme Court of Ohio does not necessarily rely upon the Barry case in arriving at its decisions in the four cases above quoted, and (2) any reliance thereon is predicated upon a correct interpretation of the definition of accidental means, in that it must be ascertained whether anything "unexpected, unforeseen or unusual occurred in the act preceding the injury". It follows that the South Dakota court erred in assuming that the Ohio court would hold that the death of Shane was the result of accidental means. There is no basis for this assumption.

To summarize, the South Dakota Court acknowledged that the law of Ohio should be followed as to what constituted injury by accidental means (R 58); correctly found that the Ohio decisions followed the rule as set forth in the Landress case, supra, which restated the rule of the Barry case (R 59); failed to note that there had been two interpretations of the rule of the Barry case, but that the right interpretation had been declared by the Landress case; wrongly assumed that the Ohio courts would follow those cases from outside jurisdictions, which wrongly interpreted the rule in the

Barry case; wrongly assumed that the Ohio courts would abandon its established rule on injury by accidental means in an anaesthetic case. We think it is clear that the South Dakota court did not arrive at the correct conclusion as to what the Ohio Courts would hold on the record in this case. We ask this Court to so find and rule.

IX.

THE SOUTH DAKOTA COURT ARBITRARILY AND WITHOUT REASONABLE BASIS ASSUMED THAT THE OHIO COURT WOULD HOLD THAT THERE WAS A PRESUMPTION THAT THE DEATH OF FORD SHANE WAS BY EXTERNAL, ACCIDENTAL MEANS, IN THE ABSENCE OF EXPRESS PROOF TO THE CONTRARY; BASING SUCH ASSUMPTION ON THE HASSEY CASE IN OHIO, SUPRA, WHICH INVOLVED AN UNEXPLAINED DEATH. (R-61)

See opinion this case, 18 N. W.2d 759 (9)

In the Hassey case, 140 O. St. 266, 43 N. E.2d 229, the insured was found dead in a building wrecked by an explosion. The circumstances of the death were entirely unknown and unexplained. In such a case, says the Hassey opinion, there is a presumption that the death was accidental. In support of that statement, the opinion cites: 29 Am. Jur. p. 1082 §1443; Graham v. N. Y. Life Ins. Co., 182 Wash. 612 ,619, 47 Pa.2d 1029, 1032; Mitchell v. Industrial Comm. 135 Ohio State 110, 19 N. E.2d 769. The latter two cases are suspected suicide cases, where the deaths were entirely unexplained. The reference to 29 Am. Jur., supra, contains the following:

> "In this respect, the authorities support the general rule that in an action on a policy insur-

ing against death caused solely by external, violent and accidental means, the burden of proof is on the plaintiff to show from all the evidence that the death of the insured was the result of accidental as well as external and violent means, but that where death by unexplained, violent and external means is established, a presumption is thereby created or prima facie proof is thereby made of the fact that the injuries were accidental, without direct and positive testimony on that point, since the law will not presume that the injuries were inflicted intentionally by the deceased or by some other person."

There was nothing unexplained nor mysterious about the circumstances of this death. All of the circumstances were detailed in the evidence. The opinion states that there was no evidence to overcome the presumption of accident. This is in error. The evidence did disclose just what caused the death of Ford Shane. Dr. Janis, the attending physician, testified that the idiosyncracy was the cause of the death. This was an internal condition of the body of Ford Shane. Dr. Doyle testified to the same effect. The trial court so found. The problem of the South Dakota Court was to ascertain what the Ohio Courts would hold in this situation. The only reasonable assumption is that the Ohio Court would apply the rule of presumption that the injury was accidental only in the class of cases noted in the Hassey case.

X.

AN ERRONEOUS ASCERTAINMENT OF WHAT THE APPLICABLE LAW IN OHIO IS, AS EFFECTUALLY DENIES TO PETITIONER THE BENEFIT OF THE OHIO LAW AS IF THE SOUTH DAKOTA COURT HAD REFUSED TO APPLY THE OHIO LAW.

In order to correct the error of the State Court, this Court must have power to make its own determination of what the Ohio law is. Otherwise, it would be within the power of the state court practically to prevent a review here. Truax v. Corrigan, 257 U. S. 312. See also Norris v. Alabama, 294 U. S. 587, 590.

XI.

CONCLUSION AND PRAYER FOR RELIEF

We have reviewed in this brief the decision of the South Dakota Court, which held that the six months limitation in the contract of insurance was not required to be enforced, and contended that the full faith and credit clause does require that it be enforced in South Dakota. We have reviewed the decision of said Court as to what the Ohio courts would hold on the question of whether the death of Shane was from an injury by accidental means, and contended that under the rule established in Ohio its courts would hold that this was not an injury by accidental means. The sustaining of either one of our contentions will require that the decision of the Supreme Court of South Dakota be reversed, and judgment ordered for the Petitioner.

Petitioner asks that both of its contentions be

sustained, that the judgment of the State Court be reversed and judgment ordered for petitioner.

Respectfully submitted,

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